

Justice Department Suggestions for Revisions in Proposed
Amendments to Freedom of Information Act in S. 2543
(Committee Print of March 25, 1974),
with references to provisions of H.R. 12471.

- I. Summary: We have tentatively grouped the various features of the above bills under 3 main headings, as follows:
- features as to which some degree of revision is considered vital for the proper administration of the Freedom of Information Act and/or of other federal programs.
 - features as to which some degree of revision is considered desirable, either for the above purposes or for fiscal reasons.
 - features as to which we perceive no substantial objection.

II. Revisions Considered Vital:

- A. Rigid Administrative Time Limits (a feature of both bills). See suggested amendment to S. 2543 captioned "Administrative Time Limits" attached hereto.
- B. Authorization of In Camera judicial inspections of all documents, including those under 1st exemption, with a re-wording of the 1st exemption (a feature

of both bills). See suggested amendment to S. 2543 captioned "In Camera Inspection and First Exemption" attached hereto.

- C. Reducing Government's Time to Answer in Court from 60 to 20 days (a feature of both bills). See suggested amendment to S. 2543 captioned "Time to Answer in Court" attached hereto.
- D. Providing Punishments for Employees and officials who, prior to court order, Improperly Withhold Records (feature of Senate bill only). See suggested amendment to S. 2543, captioned "Personnel Sanctions" attached hereto.
- E. Prohibiting User Charges for Extensive Screening Work (feature of Senate bill only). See suggested amendment to S. 2543 captioned "Services for Which Fees May Be Charged" attached hereto.
- F. Changing "Files" to "Records" in the 7th Exemption for Investigatory Files (feature of Senate bill only). See attached amendments to

S. 2543 captioned "Investigatory Files" attached hereto.

G. The Continued Omission of Authorization of Special Funds for Administering the Act (feature of both bills). See suggested amendment to S. 2543 captioned "Funding" attached hereto.

III. Revisions Considered Desirable:

A. Publication of Indexes of 5 U.S.C. 552(a)(2) types of Documents (feature of both bills). A revision of this feature is considered desirable if funding for special activities under the Act is provided (see II,G, above), but would be considered vital if funding is not provided, since the cost of this feature in its present form has been estimated by records management experts as between \$3 million and \$1.3 billion a year with a mean figure of \$648.5 million. See suggested amendment to S. 2543 captioned "Indexing" attached hereto.

- B. Attorneys Fees (feature of both bills, but in significantly different versions). A revision of this feature is considered desirable with respect to the Senate bill version, but would be considered vital with respect to the House bill version. See suggested amendment to S. 2543 captioned "Attorneys Fees" attached hereto.
- C. Annual Reports to Congress (feature of both bills). The principal problem here is the Senate bill requirement to report all who "participated" in denials, and the bill contains a similar requirement with respect to letters of denial, at pages 6-7. See suggested amendment to S. 2543 captioned "Annual Reports and Related Matters" attached hereto.
- D. Changing "Files" to "Records" in the 6th or Privacy Exemption (Senate bill only). This change will probably tend to encourage

invasions of privacy through use of the Act. No suggested amendment is attached, . . . since the form would parallel that suggested in II, F, above for Investigatory Files.

- E. Providing for the Availability of "Segregable Portions" of a Document, regardless of which Exemption is Involved (feature of Senate bill only). While to a large extent this feature restates the present law, some change is desirable and perhaps vital to protect investigatory files (in the same manner as the feature discussed in II, F, above), and also to avoid an undue tendency toward invasions of privacy; in addition any such feature should allow for the standards suggested herein with respect to judicial review of withholding of classified documents (see II, B above), and for some degree of flexibility and common sense in the screening of documents both by courts and agencies. See suggested amendment to S. 2543 captioned "Segregable Portions" attached hereto.

IV. Features Where No Revision Suggested:

- A. "Identifiable Records" Changed to Reasonable Description of Records (feature of both bills). This is satisfactory in its present form.
- B. Definition of Agency (feature of both bills, but in significantly different versions). The version in S. 2543 is satisfactory, but that in H.R. 12471 would require revision.
- C. Uniform Fee Schedules to be Established by OMB (feature of Senate bill only). This is satisfactory in its present form, subject however to the views of OMB.
- D. Expedite Appellate Court Proceedings (feature of Senate bill only). This is satisfactory in its present form.

(Suggested Amendment to S. 2543)

Administrative Time Limits (II,A)

On page 6, line 1, change "fifteen days" to "ten days" and on line 9 change "fifteen days" to "twenty days". On page 6, lines 6 and 7, insert after "the right of such person to appeal to the head of the agency" the additional words "from and to obtain judicial review of", and delete in lines 11 through 15 the sentence beginning with "If" and ending with "subsection." On page 6, delete the word "and" in line 7, substitute a semicolon for the period in line 15, and between lines 15 and 16 insert the following:

"(C) Upon the written certification of the head of an agency setting forth in detail the reasons therefor and his personal finding of the necessity thereof, and with the approval in writing of the Attorney General, the time limit prescribed in subparagraph (A) for initial determinations may by regulation be extended with respect to specified types of records of specified components of such agency so as not to exceed thirty days: Provided, that

any such certifications shall only be effective
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for periods of fifteen months following publication
thereof in the Federal Register, and Provided, further
that a copy of any such certification shall be attached
to the agency's annual report to Congress under this
section;

"(D) In unusual circumstances as defined herein,
the time limits prescribed in subparagraphs (A) and
(B), but not those prescribed pursuant to subparagraph
(C), may be extended by written notice to the requester
setting forth the reasons for such extension and the
date on which a determination is expected to be dis-
patched. No such notice shall specify a date that
would result in an extension for more than the time
prescribed in subparagraphs (A) or (B), whichever is
applicable: Provided, that where the agency finds that
its determination is likely to be controlled by an ex-
pected decision in a court case identified in such
notice, the extension may be until twenty working
days after such court decision. As used herein
"unusual circumstances" means, but only to the
extent reasonably necessary to the proper pro-
cessing of the requests, (a) the need to search for
and collect the requested records from several loca-

tions or a distant location other than the office processing the request; (b) the need to assign professional or managerial personnel with sufficient experience to assist in efforts to locate records that have been requested in categorical terms, or with sufficient competence and discretion to aid in determining by examination of large numbers of records whether they are exempt from compulsory disclosure under this section and if so, whether they should nevertheless be made available as a matter of sound policy with or without appropriate deletions; (c) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the agency having substantial interests therein, in order to resolve novel and difficult questions of law or policy; and (d) the death, resignation, illness, or unavailability due to circumstances that the agency could not reasonably foresee and control, of key personnel whose assistance

ordinarily be readily available for such duties.

"(E) Whenever practicable, requests and appeals shall be processed more rapidly than required by the time limits prescribed in or specified under (A), (B), (C) and (D). Upon receipt of a request for specially expedited processing accompanied by a substantial showing of a public interest in a priority determination, including requests with such a showing made for the use of an individual or other person regularly engaged in the collection and public dissemination of news, an agency may by regulation or otherwise provide for special procedures, or the waiver of regular procedures, and shall waive any additional fees attributable to the added costs of more expeditious rendition of its services. Whenever practicable provision shall be made by agencies for the use of oral communications, with or without written confirmation, to assist in processing requests of the nature described in the preceding sentence."

On page 6, line 20, delete "subparagraph (A) or subparagraph (B) of" and substitute "the applicable time limit provisions prescribed in or pursuant to".

(Suggested Amendment to S. 2543)

In Camera Inspection and First Exemption (II, B)

On page 3, line 9, insert after "(B)" the designation "(i)", and in line 19, after the word "exemptions" add the following: "except exemption (1) and (3)"

On page 3, between lines 21 and 22, add the following provision:

"(ii) In deciding whether a document is covered by exemptions and (3) (1) in subsection (b) of this section, a court may request affidavits and other information other than the [classified] document itself to be submitted on this issue. If the court is unable to resolve the issue on this basis, it may review the contested document in camera. Upon completion of that review, the court, if it tentatively determines or the decision that such documents requires protection the classification of such document to be clearly erroneous or arbitrary and capricious, shall order the agency to explain ex parte either by oral testimony, further affidavits, or other means, the basis for such or decision, classification. If the court then determines that the

permanently added to statute

or the decision that such document requires protection by statute
classification of such document to be unauthorized
under the criteria established by a statute or order
referred to in exemptions ^{and (3)} (1) it may order the
document released to the plaintiff. If such a dis-
closure order is appealed by the agency, the appellate
court shall consider the matter de novo, following the
procedures set forth above for district court de-
terminations. During the pendency of any such appeal
the agency is entitled to a protective order sealing
all documents and supporting evidence. A decision
by the trial court that such a document is not subject
to compulsory disclosure is appealable by the plaintiff
only for error of law, and upon such a decision, all
such documents and copies thereof and any material sub-
mitted ex parte including transcripts thereof shall
be returned by the court to the agency. In performing
functions under this paragraph, functions of the court
involving the review of classified documents and of
explanatory material submitted ex parte shall be
performed only by the judges to whom the case is assigned."

Suggested Amendment to S. 2543

Time to Answer in Court (II, C)

Substitute for the language appearing on page 3, line 22 through page 4, line 3 the following:

"(C) In any suit under this section, the plaintiff may file with his complaint a motion to reduce the time prescribed for the government to answer complaints in civil actions to a period of not less than 20 days. Actual notice of any such motion, which shall be conspicuously entitled to indicate its nature and urgency, shall be given by the plaintiff within two days after it has been filed by personal service of copies of such motion and complaint upon the official of the agency who signed the final denial complained of or upon such other agency official as may be acting upon such matters in his stead and upon counsel to such agency. The court shall dispose of any such motion as soon as possible, conferring with counsel for each party in court or by telephone as it deems appropriate, and it shall order such reduction in the time to answer as may appear warranted in the light of the plaintiff's showing that reduction will serve the public interest or avoid undue hardship and as may appear consistent with the orderly

Suggested Amendment to S. 2543

Personnel Sanctions (II, D)

On page 5, delete lines 3 through 15, and on line 16 redesignate "(G)" as "(F)".

Services for Which Fees may be Charged (II, E)

On page 2, lines 17 through 19, delete the phrases "document search and duplication" and "such search and duplication" and substitute respectively the phrases "the services performed" and "such services".

Suggested Amendment to S. 2543

Investigatory Files (II, F)

On page 7, line 18, strike the words "clauses (6) and (7)" and substitute therefor the words "clause (6)".

Suggested Amendment to S. 2543

Funding (II, G)

On page 9, line 18, redesignate "Sec. 4" as "Sec. 5" and insert between lines 17 and 18 the following:

"Sec. 4. There is hereby authorized to be appropriated such sums as may be necessary to assist in carrying out the purposes of this Act and of 5 U.S.C. 552."

Suggested Amendment to S. 2543

Indexing (III, A)

On page 1, delete on line 3 everything following the "(a)" and delete all of lines 4 through 6 and substitute therefor the following:

"The Attorney General shall include in his June 20, 1975 report to the Congress on the study of improved administration of the Freedom of Information Act, information on the cost of administering the Act and on the feasibility of publishing indexes of materials required to be made available under 5 U.S.C. 552(a)(2), together with recommendations for administrative and legislative actions pertaining thereto. In addition to such other sums as may be available for such study, the sum of \$200,000 is hereby authorized to be appropriated for the primary purposes of developing such cost information and developing information on the feasibility of such publications."

Suggested Amendment to S. 2543

Attorneys Fees (III, B)

On page 4, lines 11 and 12, delete the words "reasonable attorney fees and other litigation costs reasonably incurred" and insert in lieu thereof the words "litigation costs listed in section 1920 of title 28, United States Code,".

[Note: This language permits assessment of costs allowed against U.S. when costs are allowed at all, but does not allow assessment of attorney fees - see 28 USC 2412.]

Suggested Amendment to S. 2543

Annual Reports and Related Matters (III, C)

On page 8, line 17, delete "participated in denials" and substitute "denied or directed the denial". On lines 18 and 19, delete "participation" and substitute "such denials or directions to deny".

On page 7, lines 1 and 2, delete "participated substantively in" and substitute "made or directed the making of".

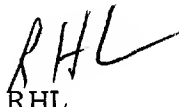
Suggested Amendment to S. 2543

Segregable Portions (III, E)

On page 7, lines 21 through 24, amend the sentence which now reads "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." to read as follows:

"Any reasonably segregable portion of a record, except records properly contained in investigatory files compiled for law enforcement purposes, shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection: Provided, that where extensive editorial or related work would be required to make such deletions in processing a request for voluminous records, an agency may propose to the requester alternative methods to respond to his request, and any such proposals or the absence thereof may be considered by a court if there is substantial doubt whether the records are reasonably segregable."

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REMARKS

4/9/74

To Distributees:

If you have any comments, questions or suggestions on the attached, please get them to me ASAP, and in any event before 12 noon on April 15th.

Thank you.

RLS

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